Supreme Court, U.S.
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96 814 SEP 6 1996

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No.

IN THE
Supreme Court of the United States

October Term, 1996

RALPH M. ROGERS,

Petitioner,

v.

SARA JANE OVERSTREET &
ALAN W. CONNELL, ATTORNEY,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was forced to file for Chapter 13 bankruptcy protection in Federal Bankruptcy Court after financial difficulties including child support arrears. State Superior Court had found petitioner in contempt for arrears in child support and various joint debt although the judgment was based on documented severe errors in fact related to petitioner's child support obligations. Respondents claimed that collection of child support arrears and other debt were not stayed by the automatic stay provisions of federal bankruptcy code. Respondents argued that they had no obligation to stop State Superior Court actions against petitioner once the State Superior Court's order had been issued for noncustodial parent's arrest. Petitioner was incarcerated for two weeks as an act of State Superior Court in behalf of respondents to collect pre-petition debt. Allowing Superior Court to incarcerate debtors although under federal protection appears to be a common strategy for attorneys in the Griffin Judicial Circuit (Georgia) to compel payment for pre-petition debt--generally from near or distant relatives who have no legal obligation to pay the debt.

1. Did the Eleventh Circuit Court of Appeals err holding, in conflict with the teachings of this Court and in conflict with Federal Courts in the Third and Sixth Circuits, by affirming the judgment of Federal Bankruptcy Court of Northern Georgia, later affirmed by U.S. District Court of Northern Georgia that child support arrears and other domestic relations debt continue to be exempt from automatic stay provisions of U.S. bankruptcy code based on a domestic relations exception doctrine?

2. Did the Eleventh Circuit Court of Appeals err holding, in conflict with the Sixth Circuit and Federal Courts in the Second, Third, and Sixth Circuits, by affirming the judgment of Federal Bankruptcy Court of Northern Georgia, later affirmed by U.S. District Court of Northern Georgia that creditors did not have a duty

to take affirmative action to stop collection actions for pre-petition debt taken in their behalf by State Superior Court and in particular were not obligated to file formal motions before State Superior Court to stop collection activity?

3. Did the Eleventh Circuit Court of Appeals err holding, in conflict with Federal Rules of Evidence and Federal Rules of Civil Procedure, by affirming the judgment of Federal Bankruptcy Court of Northern Georgia, later affirmed by U.S. District Court of Northern Georgia that respondent's evidence presented in bankruptcy court allegedly supportive of allegedly informally asking State Superior Court to stop collection activities did not violate Federal Rules of Evidence and erred in holding that such evidence met standards of evidentiary support?

4. Did the Eleventh Circuit Court of Appeals err holding, in conflict with Federal Courts in the Second and Ninth Circuits, affirming the lower courts' view that contested funds borrowed to obtain release from incarceration were not part of Petitioner's/ Debtor's Estate?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.

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DECISIONS BELOW

The decision of the federal bankruptcy court is reported as *Rogers v. Overstreet*, 164 B.R. 382 (Bankr. N.D. Ga 1994). The decisions of federal district court and the court of appeals affirming federal bankruptcy court's decision are unpublished.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment in this case on June 6, 1996. This Court has jurisdiction under 28 U.S.C. § 1254 (1). The underlying suit regarding Complaint for violation of automatic stay provisions of U.S. bankruptcy code was brought in the United States District Court for the Northern District of Georgia on appeal from the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division. See: 28 U.S.C. § 158(a) and Bankruptcy Rule 8001(a). Appeal from the final order of the District Court is made pursuant to 28 U.S.C. § 158(d). The appeal was timely filed on August 2, 1994 in U.S. District Court subsequent to entry of that Court's Order and Judgment on July 25, 1994. RALPH M. ROGERS/Appellant is a resident of Griffin, Georgia. SARA JANE OVERSTREET/Appellee is a resident of Spalding County, Georgia and ALAN CONNELL/Appellee is authorized to and doing business within the State of Georgia.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

From 11 USCS § 362(a), federal bankruptcy code, the automatic stay is applicable to all entities, of--

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a

claim against the debtor that arose before the commencement of the case under this title:

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of the property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;

From 11 USC § 541(a)(7), federal bankruptcy code:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(7) Any interest in property that the estate acquires after commencement of the case.

From Federal Rules of Evidence, 801(d), regarding substantive use of a statement for use at trial, hearing or other proceeding:

(d) Statements which are not hearsay. A statement is not hearsay if--

(1)Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial,

hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

From Federal Rules of Civil Procedure, Rule 52(a):

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

STATEMENT OF THE CASE

This is a case about federal bankruptcy protection when child support arrears are part of pre-petition debt as well as other debt initially under collection action by State Superior Court but later included in a Chapter 13 federal bankruptcy plan. The applicability of the automatic stay provisions is important because without the applicability of the automatic stay to collection of debt through state

court, the viability of debtor's bankruptcy plan is at risk and other creditors' interests are at risk. This case is one example of how attorneys in the Northern District of Georgia circumvent bankruptcy law to collect pre-petition debt--apparently with the tacit blessing of Federal Bankruptcy Court in that district.

A. Statement of Facts

The central issues in the underlying complaint involve Debtor/Appellant's filing of bankruptcy for protection under the automatic stay under the U.S. bankruptcy code from actions by ex-wife/Defendant and her domestic attorney/Defendant for child support arrears as well as other debt including attorney fees and obligations on ex-wife's Sears debt.

On January 19, 1993, Judge Whalen of Spalding County Superior Court (Georgia) entered an order finding Rogers (Debtor) in contempt for partial nonpayment of child support, attorney fees, and ex-wife's Sears debt; ordered Rogers' incarceration but deferred that action pending his purging contempt by paying off within 15 days of the order all child support arrears ($4,625), accelerated debt on the Sears account ($1,934) and attorney fees for ex-wife ($575) and other ($390)--for a total of $7,524. Monthly child support was $920 plus insurance and medical expenses. Payment on arrears was required to be made to the court Clerk by the end of business on February 3, 1993. Judge Whalen's order contains numerous errors--in particular the percent of income Debtor was paying in child support was stated to be 5 percentage points below that actually being paid by Debtor. These figures were the basis for denial of modification of child support and for a finding of contempt for child support arrears. Debtor's domestic attorney advised him to file for bankruptcy protection rather than appealing. (In subsequent hearings before Superior Court, that court implicitly acknowledged Judge Whalen's errors.)

Petitioner/Debtor Rogers signs papers for bankruptcy on February 3, 1993 with Attorney William Johnson in Griffin and Rogers personally files papers with Bankruptcy Clerk in Newnan on

February 4, 1993. Attorney Johnson notifies Defendant/Attorney Connell of bankruptcy filing via facsimile on February 4, 1994. R1-1-1. At the end of day, February 3, 1993, Clerk of Superior Court certifies nonpayment on Order of Judge Whalen and sends to Spalding County Sheriff's Department. Debtor Rogers is arrested on the night of February 4, 1994 for nonpayment despite Rogers' presenting bankruptcy papers to the arresting deputy and explanation of the automatic stay.

On February 5, 1993, Debtor/Plaintiff's bankruptcy attorney files adversary complaint #93-1012N via U.S. mail against ex-wife and her attorney for allowing Debtor's arrest. R1-1-1. The complaint was docketed on February 8, 1993. Petitioner's mother agrees to loan him the funds until turnover is ordered. She obtained a portion of her retirement funds for Petitioner's release on February 19, 1993, paying loaned funds to Clerk of Superior Court on that date according to Petitioner's instructions. Petitioner/Debtor loses two weeks vacation, valued at $1,885 on a salary equivalent basis.

At no time during Petitioner's two week incarceration did ex-wife's attorney inform Judge Whalen of Petitioner's filing of bankruptcy nor did he ask for Petitioner's release from incarceration.

On February 26, 1993 Respondent/Defendant (attorney) Connell obtained contested funds from Clerk of Superior Court and presented them to his client, Debtor's ex-wife--Defendant Overstreet. At this time, Defendants had not had a hearing for relief from the automatic stay, had not requested such a hearing, and had not been granted relief from the automatic stay. Nor had Bankruptcy Court made any decision on Adversary # 93-1012N, nor had Bankruptcy Court made any decision--much less a written decision--allowing Defendants to obtain the contested funds. Attorney Connell specifically admits under questioning in Bankruptcy Court that he never asked Superior Court to stop Debtor's incarceration. The evidence presented in Bankruptcy Court in Defendant's behalf violated Federal Rules of Evidence. Importantly, the evidence was unrelated to Bankruptcy matters and clearly did not support Defendants' exoneration.

B. Course of Proceedings

On February 8, 1993, Debtor Ralph M. Rogers filed a complaint against Sara Jane Overstreet, ex-wife of Debtor, as well as Alan W. Connell, domestic attorney for Overstreet. R-1-1. Said Complaint (Case No. N93-10256-WHD, Adversary 93-1012N) sought relief based upon Debtor's incarceration by Defendants in violation of the automatic stay provisions of the U.S. bankruptcy code.

On February 25, 1993, a hearing was held in federal bankruptcy court for adversary 93-1012N--the matter sought for review before this Court. Bankruptcy judge stopped the public proceeding and asked for a chambers conference after other unrelated proceedings were concluded. Attending were Petitioner's attorney (prior to release from this case), Respondents' attorney, Defendant/ Respondent Connell, and Trustee. Petitioner/Debtor was excluded. No decision was announced. Debtor was told by counsel that the court was to make a ruling later.

On June 3,1993, Debtor released his bankruptcy attorney and proceeded on a pro se basis.

On August 18, 1993, Bankruptcy Court docketed a notice that adversary #93-1012N--due to its inactive status--would be dismissed within 20 days unless further action is requested by Debtor's attorney. R1-9-1. On August 25, 1993, Debtor files an update with Bankruptcy Court and requests a consolidation of adversary cases #93-1012N, #93-1044N, and #93-1059N. R1-11-1 and R1-12-1. On September 24, 1993, Bankruptcy Court grants Debtor's request for consolidation--but only on an administrative basis. R1-13-1.

On November 18, 1993 a consolidated hearing was held in Bankruptcy Court for the three adversary cases. Transcript: R1-20-1 and R1-20-38.

On January 20, 1994 the United States Bankruptcy Court for Northern District of Georgia, Newnan Division, entered order denying relief requested by Debtor in Adversary 93-1012N and in Adversary 93-1059N. R1-21-1 and R1-22-1. Bankruptcy Court entered a partial judgment in favor of Defendant Overstreet in Adversary 93-1044N, pending further argument on whether debt owed to Sears was in the nature of property settlement or maintenance of children. The court's rulings were based the court's beliefs that Defendants had no obligation to request Debtor's release from incarceration (R1-21-18 and R1-21-20), that collection of pre-petition child support arrears were not subject to the automatic stay due to a domestic relations exception doctrine as expounded by Carver (R1-21-14), and that contested funds were not part of Debtor's estate. R1-21-21. The Court declined to address the issues of damages and abstention. R1-21-20. Bankruptcy Court did not explain why Defendants did not have an obligation to stop collection actions taken by State Superior Court. Bankruptcy Court also issued the opinion that contested funds borrowed from Debtor's mother to obtain release from incarceration were not part of Debtor's estate but did not state any statutory basis for this exclusion.

On January 26, 1994 Debtor filed appeals with the U.S. District Court, Newnan Division. R1-23-1. Adversary 93-1012N was docketed as 3:94-CV-20-JTC and Adversary 93-1044N was docketed as 3:94-CV-21-JTC. On July 25, 1994, District Court entered an order affirming Bankruptcy Court's judgment and in its order agreed that Respondents/Defendants had no obligation to stop collection actions taken in their behalf by State Superior Court to obtain pre-petition child support arrears and other pre-petition debt including attorney fees and Sears debt. District Court affirmed Bankruptcy Court's opinion that contested funds borrowed from Debtor's mother were not part of Debtor's estate. District Court did not state any statutory basis for excluding these funds from Debtor's estate. District Court noted that separate adversary No. 93-1044N was not in final and appealable form.

On August 2, 1994, Debtor timely filed a Notice of Appeal to United States Court of Appeals for the Eleventh Circuit with the

Clerk of District Court, Newnan Division, for both C.A.F. # 3:94-CV-20-JTC and 3:94-CV-21-JTC from the Order denying Plaintiff's relief. R2-9-1.

On September 9, 1994, the Clerk of the United States Court of Appeals for the Eleventh Circuit sent a memorandum to parties and counsel raising the jurisdictional question of whether the District Court's July 20, 1994 Order affirming the Bankruptcy Court's ruling in Adversary No. 93-1044N was not final and appealable because it did not dispose of all claims asserted in that proceeding, referencing 28 U.S.C. §1291.
adoption of Bankruptcy Court's Order.

On December 20, 1994, Appellant filed appeals to District Court for Adversary No. 93-1012N and Adversary No. 93-1044N under Bankruptcy Rule 8001(d)(3) and other applicable rules.

On December 22, 1994, Appellant filed with the Eleventh Circuit Court of Appeals Motion to Reinstate Case and Motion to Stay Proceedings, for Adversary No. 93-1012N because Appellant had not placed both adversary cases before the Court of Appeals on a consolidated basis and the jurisdictional question before the Court of Appeals only applied to Adversary No. 93-1044N.

On February 6, 1995, the Clerk of the Court of Appeals for the Eleventh Circuit reinstated Appeal No. 94-8880 to hear solely arguments for Adversary No. 93-1012N.

On June 6, 1996, the U.S. Court of Appeals for the Eleventh Circuit affirmed lower Court's decisions, ruling that Bankruptcy Court's Judgment was not clearly erroneous.

On June 26, 1996, Petitioner filed a Suggestion for a Rehearing En Banc and on July 29, 1996, the Court of Appeals denied that request.

This case presents in the context of federal bankruptcy law, the question of whether creditors are obligated to take specific actions to stop actions taken in their behalf by state courts to collect pre-petition child support arrears. The Court of Appeals for the Eleventh Circuit affirmed without opinion the District Court's affirmation that the Bankruptcy Court of Northern Georgia's judgment that child support debt remains under a domestic relations exception doctrine, that creditors were not obligated to take action to stop collection activities of state court, and that petitioner/debtor was not due damages for incarceration in violation of the automatic stay, and that contested funds were not part of Debtor's Estate.

These judgments are outside the decisions of courts outside of the Eleventh Circuit and conflict with clear teachings of this Court. Therefore, this Court should grant the petition for certiorari.

I. The Decision By the Eleventh Circuit Court of Appeals Affirming the Lower Courts' View That Child Support Arrears Continue To Be Exempt From Automatic Stay Provisions of U.S. Bankruptcy Code Under A Broad Definition of A Domestic Relations Exception Doctrine Is In Conflict With Teachings Of This Court and Courts In Federal Districts Outside of the Eleventh Circuit, Notably in the Third and Sixth Circuits.

First, the U.S. Supreme Court in Ankenbrandt v. Richards, 112 S.Ct. 2206 (1992), affirms the existence of a domestic relations exception but points out that the exceptions are limited narrowly. Petitioner's case before the court does not fit into the exceptions defined by Ankenbrandt as well as the earlier Barber decision. Also, the U.S. Supreme Court held that domestic relations exception to federal diversity jurisdiction exists as a matter of statutory construction. The Ankenbrandt Court specifically notes that the domestic relations exception is limited only to cases involving the issuance of a divorce, alimony, or child custody decree.

> By concluding, as we do, that the domestic relation exception encompasses only cases involving the issuance of a divorce,

> alimony, or child custody decree, we necessarily find that the Court of Appeals erred by affirming the District Court's invocation of this exception. This lawsuit in no way seeks such a decree; rather it alleges that respondents Richards and Kesler committed torts against L.R. and S.R., Ankenbrandt's children by Richards. Ankenbrandt v. Richards, 112 S.Ct. 2206 (1992), p. 2215.
>
> The Ankenbrandt Court notes:
>
> Abstention should rarely be invoked, because the federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." Ankenbrandt v. Richards, 112 S.Ct. 2206 (1992), p. 2215.

Hence, the domestic relations exception does not apply to Petitioner's case since Petitioner is not seeking the granting or modification of a divorce, alimony, or child custody decree. Importantly, as pointed out by the Ankenbrandt Supreme Court, federal courts have an obligation to assume jurisdiction.

Other case law also support Appellant's argument that federal courts have exclusive jurisdiction to administer pre-petition claims for child support arrears. See In Re Henry, 143 B.R. 811 (Bkrtcy. W.D. Pa. 1992) and In Re Walter, 153 B.R. 38 (Bkrtcy N.D. Ohio 1993). In Re Walter severely criticizes the Caswell [Caswell v. Lang, 757 F.2d 608 (4th Cir. 1985)] line of cases which Carver follows and upon which Rogers v. Overstreet is based. In Re Henry shows that the automatic stay applies to existing court orders from state court and that creditor is required to take action to return monies and to discontinue garnishment existing prior to bankruptcy filing.

II. The Eleventh Circuit Court of Appeals Erred Holding, In Conflict With the Sixth Circuit and Federal Courts in the Second, Third, and Eighth Circuits, By Affirming the Judgment of Federal Bankruptcy Court of Northern Georgia, Later Affirmed By U.S. District Court Of Northern Georgia That Creditors Did Not Have A Duty

To Take Affirmative Action To Stop Collection Actions For Pre-petition Debt Of Child Support Arrears Taken in Their Behalf By State Superior Court and in Particular Were Not Obligated To File Formal Motions Before State Superior Court To Stop Collection Activity.

Defendants first violated the automatic stay by not acting to prevent Debtor's arrest once Defendants were notified of the bankruptcy filing. As noted in Complaint, Defendant/Attorney Connell was notified via facsimile of Debtor's filing of bankruptcy prior to Debtor's incarceration. R1-1-1. Respondent/Defendant was obligated to take all reasonable actions to prevent Debtor's arrest and--once he was arrested--to press State Superior Court for Debtor's release.

> Automatic stay extends to virtually all formal and informal action against property of bankruptcy estate, and actions taken in violation of stay are generally void, even if creditor had no notice of stay. Re Smith (1989, CA6 Mich) 876 F2d 524, CCH Bankr L Rptr ¶ 72936.

Respondents (Debtor's ex-wife and her attorney) had an obligation to release Debtor from incarceration.

> "Act" within meaning of 11 USCS § 362 is not limited to affirmative actions; refusal or failure to take action is "act." Re Dembek (1986, BC ND Ohio) 64 BR 745, 15 CBC2d 611.

Re Johnson clarifies the issue of duty. First, Re Johnson quotes from House Report No.95-595:

> By preventing creditors from attacking the debtor's estate, the automatic stay gives the trustee time to identify, marshall, and distribute equitably the assets of the debtor.
> In interpreting the provisions of § 362(a), the Court must construe the section liberally to give full protection to the

> debtor and creditors. Re Johnson, 8 B.R. 371 (1980), p. 374.

Also seen in Re Johnson:

> An "act" as used in § 362 means more than just an overt action by the creditor. It includes all changes in the relationship between the debtor and his creditors. Re Johnson, 8 B.R. 371 (1980), p. 374.

Respondents/Defendants are obligated to take actions to prevent any change in status between Petitioner/Debtor and Respondents/Creditor. Case law specifically states that creditors have an obligation to restore status quo once informed of the violation of the automatic stay. Re Stephen W. Grosse, P.C. (1987, BC ED Pa) 68 BR 847. Re Clark (1986, BC ND Ohio) 60 BR 13). Re Adams (1989, BD ED Pa) 94 BR 838.

Creditors are obligated to vacate existing orders from non-Bankruptcy courts that are coercive to Debtor and creditors are to be found in contempt when affirmative action is not taken. Creditors have obligation to restore status quo. In Re McLean Industries, Inc. a creditor was required to stop collection by another court. Re McLean Industries, Inc. (1987, BC SD NY) 76 BR 291, 17 CBC2d 415, later proceeding (BC SD NY) 74 BR 589 , 16 BCD 18, later proceeding (BC SD NY)76 BR 328, 16 BCD 420, 17 CBC2d 155.

Respondents/Defendants were obligated to preserve the pre-petition relationship with Debtor and were obligated to inform Superior Court Judge Whalen of the commencement and to file a written Motion to Stay Order with state court. To not do so were acts to continue to use coercion to obtain payment for pre-petition debt. Debtor was incarcerated over two weeks; Respondents had ample opportunity to file such motions but did not. The intent was to compel payment of pre-petition debt in violation of the automatic stay of federal bankruptcy code.

III. The Eleventh Circuit Court of Appeals Erred Holding, In Conflict With Federal Rules of Evidence and Federal Rules of Civil Procedure, By Affirming the Judgment of Federal Bankruptcy Court of Northern Georgia, Later Affirmed By U.S. District Court of Northern Georgia That Respondent's Evidence Presented In Bankruptcy Court Allegedly Supportive of Allegedly Informally Asking State Superior Court To Stop Collection Activities Did Not Violate Federal Rules of Evidence and Erred In Holding That Such Evidence Met Standards of Evidentiary Support.

As referenced in Federal Bankruptcy Court's Order as key evidence, as referenced in transcripts for a hearing in Federal Bankruptcy Court in November 1993, and referenced in Petitioner's earlier briefs, Respondents/Defendants depended on a letter containing statements from Superior Court Judge Andrew Whalen that allegedly stated the he was informed of Petitioner's bankruptcy filing. This letter, however, was in regard to an unrelated matter and clearly violated Federal Rules of Evidence, Rule 801, in that the witness was not under cross-examination. This letter is attached in the Appendix, is the only evidence cited by the lower court supportive of its finding, and clearly is unrelated to the issue of Respondents meeting automatic stay obligations. Additionally, in a separate adversary case, Judge Whalen specifically stated that he had not been informed by Respondent Connell.

Under Federal Rules of Civil Procedure, Rule 52(a), the standards of review are "clearly erroneous" and "lack of evidentiary support." Testimony, written and oral, presented in Bankruptcy Court by Appellee's domestic attorney, Alan Connell, as well as written testimony by Superior Court Judge Whalen clearly indicate that lower courts were in error to find that Attorney Connell informed Superior Court Judge Whalen of Debtor's bankruptcy filing. Judge Whalen denies being informed by Alan Connell of Appellant's filing of bankruptcy.

Supporting this argument, in testimony before Bankruptcy

Court on November 18, 1993, Attorney Connell admits he never asked Judge Whalen to release Appellant from incarceration. R1-20-30. On page 30, lines 9-11 of the transcript of the hearing Alan Connell states, "I never asked Judge Whalen to release Mr. Rogers." This admission alone indicates that lower courts were clearly erroneous.

Contrary to the bankruptcy court's finding, the evidence overwhelmingly shows that Alan Connell did not inform Judge Whalen of Appellant's bankruptcy filing nor did he ask Judge Whalen to release Appellant. Earlier finding of fact is not supported by substantial evidence and is clearly against the weight of the evidence.

IV. The Decision By The Eleventh Circuit Court of Appeals Affirming The Lower Courts' View That Contested Funds Borrowed To Obtain Release From Incarceration Were Not Part of Debtor's Estate Is Contrary To Case Law In The Second and Ninth Circuits.

The most important reason contested funds should be returned by Respondents is that contested funds were obtained through violations of the automatic stay provisions of federal bankruptcy code--violations that threatened the interests of other creditors. Additionally, the funds requested for turnover clearly are part of Debtor's estate and should be returned to Debtor. The funds paid to the Clerk of Spalding County Superior Court are property of the Estate and it is proper that Respondents/Defendants be ordered to return the funds to the Estate.

The funds were obtained originally by Petitioner/Plaintiff through a contract for a loan, thereby giving Petitioner title to the funds, which remained under his control through his agent.

11 USC § 541(a)(7):

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property,

> wherever located and by whomever held:
> (7) Any interest in property that the estate acquires after the commencement of the case.

Property of the estate includes all types of property and includes "title" interest--not just possessory interest.

> Senate Report No. 95-989, 1st Paragraph:
> This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6) [section 110(a)(6) of former title 11]), and all other forms of property currently specified in section 70a of the Bankruptcy Act § 70a [section 110(a) of former title 11], as well as property recovered by the trustee under section 542 of proposed title 11, if the property recovered was merely out of the possession of the debtor, yet remained "property of the debtor." The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or lease-hold interest, for example. The result of Segal v. Rochelle, 382 U.S. 375 (1966), is followed, and the right to a refund is property of the estate.

Petitioner/Plaintiff was in control of funds through his agent and this warrants turnover of funds.

> Management company's acquisition of machines from agent of debtor was in violation of automatic stay despite company's contention that debtor had no property interest in machines or that machines were not taken from debtor's possession; court need not determine whether debtor had property interest in machines because language of 11 USC §

> 362 is clear that mere possession of property is sufficient to invoke protection of automatic stay and debtor was effectively in possession through its authorized agent. Re Turbowind, Inc. (1984, BC SD Cal) 42 BR 579, 12 BCD 362, 11 CBC2d 443.
>
> Bankruptcy estate is not confined to property owned by debtor; leasehold or mere possessory interest falls within 11 USC § 541; mere possessory interest also enjoys protection of automatic stay. Re 48th Street Steakhouse, Inc. (1986, BC SD NY) 61 BR 182.

Bankruptcy Court ruled that a loan for these funds exists between Debtor and Barbara S. Rogers, Debtor's mother and subsequent rulings were in conflict with this ruling. In hearing transcripts from November 1993, the Trustee makes no mention of any agreement between Debtor's former counsel and Respondents' counsel that contested debt was determined to not be part of Debtor's Estate. Instead, transcripts show the Trustee was waiting on an order from bankruptcy court regarding disposition of the matter.

Furthermore, Respondents/Defendants were notified of the Trustee's Motion to change the status of the loan and Defendants made no objection as to the validity of the loan. The existence of this loan has already been adjudicated (R1-20-41) and cannot be contested by Defendants under the doctrine of res judicata.

Essentially, Bankruptcy and District Court's findings that contested funds were not part of Debtor's Estate were an after-the-fact justification for not enforcing the automatic stay provisions of federal bankruptcy code.

CONCLUSION

Rogers v. Overstreet clearly is in conflict with mainstream views outside of the Eleventh Circuit regarding the applicability of the automatic stay provisions of Federal Bankruptcy Code as related to domestic relations matters. It is important that this Court mandate

that creditors take action in state court to honor the automatic stay--specifically to take reasonable written motions before state court asking that the automatic stay be honored by state court and allow pre-petition debts--including child support arrears and other debts--to be settled through Federal Bankruptcy Court.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

In view of the Eleventh Circuit's clear departure from the decisions of this Court, and in view of the fact that the Eleventh Circuit stands alone in pursuing this deviant course, in conflict with the consistent view of federal courts in other federal circuits, as discussed above, this Court should consider disposing of this petition by summary reversal of the judgment below under Rule 16.1. Accordingly, Petitioner asks this court to award damages of $1,885 for the salary equivalent of lost vacation while illegally incarcerated plus other punitive damages (civil or criminal) as this Court deems fit and proper. Petitioner/Debtor also asks this Court to order Respondent/Defendant to turn over contested funds of $7,524 to Petitioner or to Trustee for proper disbursement in order to return Debtor/Creditor relationship to pre-petition status.

Respectfully submitted,

September 4, 1996

Ralph M. Rogers

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APPENDIX A--JUDGMENT OF UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBERS
RALPH M. ROGERS,	:	BANKRUPTCY CASE NO. N93-10256-WHD
Debtor.	:	
RALPH M. ROGERS,	:	
Plaintiff,	:	ADVERSARY CASE NO. 93-1012N
v.	:	
SARA JANE OVERSTREET and ALAN CONNELL, Attorney	:	
Defendants.	:	IN PROCEEDINGS UNDER CHAPTER 13 OF THE BANKRUPTCY CODE

JUDGMENT

Judgment is hereby entered for the Defendants against the Plaintiff in the above-styled adversary prodeeding in accordance with the Order of the Court entered the 20 day of January, 1994.

At Newnan, Georgia, this 20 day of January, 1994.
s/W. Homer Drake, Jr.W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

ENTERED ON DOCKET
JAN 20, 1994 s/ c a
s/SEE S.L.

APPENDIX B--ORDER OF UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

ENTERED ON DOCKET
JAN 20 1994 s/ c a
s/SEE S.L.

IN THE MATTER OF: RALPH M. ROGERS, Debtor.	: : : :	CASE NUMBERS BANKRUPTCY CASE NO. N93-10256-WHD
RALPH M. ROGERS, Plaintiff, v. SARA JANE OVERSTREET and ALAN CONNELL, Attorney Defendants.	: : : : : : : : : : : : :	ADVERSARY CASE NO. 93-1012N IN PROCEEDINGS UNDER CHAPTER 13 OF THE BANKRUPTCY CODE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBERS
RALPH M. ROGERS,	:	BANKRUPTCY CASE
	:	NO. N93-10256-WHD
Debtor.	:	
	:	
RALPH M. ROGERS,	:	
	:	
Plaintiff,	:	ADVERSARY CASE
	:	NO. 93-1044N
v.	:	
	:	
SARA JANE OVERSTREET	:	
	:	IN PROCEEDINGS
	:	UNDER
Defendant .	:	CHAPTER 13 OF THE
	:	BANKRUPTCY CODE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF: RALPH M. ROGERS, Debtor.	:	CASE NUMBERS BANKRUPTCY CASE NO. N93-10256-WHD
RALPH M. ROGERS, Plaintiff, v. SARA JANE OVERSTREET and ALAN CONNELL, Attorney Defendants.	:	ADVERSARY CASE NO. 93-1059N IN PROCEEDINGS UNDER CHAPTER 13 OF THE BANKRUPTCY CODE

ORDER

This matter comes before the Court on the three adversary proceedings commenced by Ralph M. Rogers (hereinafter "Debtor") against Sara Jane Overstreet and Alan W. Connell (collectively hereinafter "Defendants"). The Debtor brought these actions alleging the Defendants violated the automatic stay of 11 U.S.C. § 362 on three separate occasions. The Court finds that the issues contained herein arise in a core proceeding within the meaning of 11 U.S.C. § 157(b). A hearing was held on November 18, 1993, after which the Court took these matters under advisement and gave the parties twenty days to submit briefs. After careful review of all the testimony given and of the pertinent law, the Court makes its decision based

upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor and Defendant Overstreet were husband and wife, but their marriage was terminated by decree of the Superior Court of Spalding County, Georgia, on May 2, 1991. As a result of the divorce, the Debtor incurred various support obligations to his former wife. Specifically, the Debtor was required to pay $460.00 per child per month for support and maintenance. Since there were two children from the marriage, the Debtor's monthly payments were $920.00. In addition, the decree obligated the Debtor to pay Overstreet's attorney's fees.[1] This sum amounted to $1,150.00 and was payable in installments of $100.00 per month. Moreover, the Debtor was ordered to satisfy a Sears bill of $1,934.00. Finally, the decree required the Debtor and Overstreet to maintain separate medical insurance policies covering the children, and to pay one half each of the medical expenses not covered by this insurance. Overstreet retained custody of the two children.

Immediately after the divorce decree was entered, Overstreet began experiencing difficulty in collecting these support obligations from the Debtor. In fact, less than four months after the decree, Overstreet was forced to bring a contempt action against the Debtor as he had failed to make payments.[2] The state court in that action found the Debtor to be in contempt for his failure to pay child support as awarded in the decree.

Nevertheless, problems continued with the monthly support payments, and Overstreet filed a second contempt action on August

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[1] Overstreet's attorney in these domestic relations matters was and continues to be Defendant Connell.

[2] Overstreet v. Rogers, No. 91-V-1223 (Super. Ct. of Spalding County, Georgia, Sept. 13, 1991).

17, 1992.[3] In response to this action, the Debtor filed a complaint seeking modification of custody and child support.[4] These matters were heard by the Honorable Andrew J. Whalen, Jr., Judge of the Superior Court of Spalding County, Georgia, who entered an Order dated January 19, 1993. By this Order, Judge Whalen refused to decrease the monthly child support obligations owed by the Debtor. Judge Whalen noted that at the time of the original decree, the Debtor had an annual income of $45,300.00. As such, his monthly suport payments of $920.00 constituted slightly more than twenty percent of his gross income. The state guidelines for establishing support for two children, however, suggest an amount between twenty-three and twenty-eight percent of the parent's income. Since the divorce decree had been entered, the Debtor had received a four percent raise, making his annual income $49,000.00. As a result, his monthly support payments constituted only eighteen percent of his gross income, which was five percent below the state guidelines. Based upon these facts, Judge Whalen denied the Debtor's request to reduce his monthly support obligations.[5]

Judge Whalen then found the Debtor to be in wilful contempt of the original divorce decree for his repeated failure to pay his obligations. Specifically, the state court found the Debtor to be deficient in the following amounts:

Child Support	$4,625.00
Medial Expenses	390.00

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[3] Overstreet v. Rogers, No. 92-V-1512 (Super. Ct. of Spalding County, Georgia).

[4] Overstreet v. Rogers, No. 92-V-1588 (Super. Ct. of Spalding County, Georgia).

[5] Judge Whalen, however, did grant the Debtor's request to drop the medical insurance policy he maintained for the children. The divorce decree was modified so as to require the Debtor and Overstreet to split the costs of one insurance policy and any expenses not covered by this insurance.

Sears Bill	1,934.00
Attorney's fees from original decree	325.00
Attorney's fees for contempt action	250.00
TOTAL	$7,524.00

As punishment for the Debtor's contempt, Judge Whalen ordered that he be incarcerated immediately in the public jail of Spalding County, Georgia, until further order of the state court. The court, however, gave the Debtor fifteen days within which to purge himself of this contempt by paying into the registry of the Superior Court the sum of $7,524.00 for delivery over to Defendant Overstreet.

The Debtor's grace period expired on February 3, 1993. At that time, Myrtle F. Peeples, Clerk of the Superior Court of Spalding County, Georgia, certified that she had not received the required funds from the Debtor. Faced with imminent incarceration for his wilful contempt of the state court, the Debtor filed a Chapter 13 petition in this Court on February 4, 1993, seeking the protection of the automatic stay of 11 U.S.C. § 362. Later that day, however, a deputy of the Spalding County sheriff's department arrested the Debtor at his residence. In an unsuccessful attempt to prevent his arrest, the Debtor showed the deputy a copy of his bankruptcy filing. Once in jail, the Debtor apparently made repeated attempts to contact Judge Whalen, requesting that he be released in view of his bankruptcy petition, but to no avail. Moreover, Defendant Connell, in his capacity as Overstreet's attorney, received by facsimile a copy of the Debtor's petition. Connell, too, informed Judge Whalen of the petition, but Judge Whalen apparently refused to rescind or modify his Order of January 19, 1993. As a result, the Debtor remained incarcerated.

The Debtor resided in the Spalding County jail until February 19, 1993. At that time, his mother, Barbara S. Rogers, paid the necessary funds to the Clerk of the Superior Court, and the Debtor was released. By Order dated February 22, 1993, Judge Whalen authorized these funds to be paid to Overstreet. Nevertheless, Overstreet did not collect the money at that time.

On February 26, 1993, this Court held an in chambers conference to discuss certain matters of the Debtor's chapter 13 case. In attendance were Defendant Connell, Alan W. Jackson and Randy E. Connell, as attorneys for the Defendants, William T. Johnson, as attorney for the Debtor,[6] and the Chapter 13 Trustee, M. Regina Thomas. At this conference, the parties discussed the funds that Barbara Rogers paid into the registry of the Superior Court, and concluded that they were not property of the Debtor's estate.[7] Based upon the results of this conference, Overstreet collected the money from the Clerk of the Superior Court in satisfaction of the Debtor's prepetition arrearage.

The domestic relations dispute between the Debtor and Overstreet continued after the Debtor was released from jail. On May 21, 1993, the Debtor commenced an action for contempt and modification of visitation rights in state court.[8] In response to this action, the Defendants filed a counterclaim against the Debtor, alleging he was in arrears of his child support obligations and certain medical payments. Moreover, the Defendants sought an increase in monthly support payments and a modification of visitation rights. The state court found the Debtor to be in contempt for failing to make payments on medical insurance obligations which accrued postpetition. As for prepetition debt, the court found the Debtor to be in arrears in child support payments amounting to $360.00 and insurance premiums amounting to $33.77. In view of the automatic stay, however, the state court took no action to hold the Debtor in

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[6] Sometime prior to June 3, 1993, the Debtor released Johnson as his attorney, and since has pursued this case as a pro se debtor.

[7] The Court notes that the Debtor disagrees that such a conclusion was reached. The Debtor, however, was not present at this conference. Based upon its own recollection of the meeting and the testimony given by the Chapter 13 Trustee, see Tr. At 39-40, the Court declines to accept the Debtor's version of what transpired.

[8] Rogers v. Overstreet, No. 93-V-861 (Super. Ct. of Spalding County, Georgia).

contempt for the prepetition debts, and it took no action to enforce its order in any way.

The parties to this domestic relations dispute have not limited their litigious nature to the confines of the state courts. In fact, the Debtor has filed adversary proceedings against the Defendants in this Court, alleging violations of the automatic stay. The Debtor commenced the first action, case number 93-1012N, on February 8, 1993, seeking to have both Defendants held in contempt for having the Debtor incarcerated after the filing of his bankruptcy petition. The second complaint, case number 93-1044N, was filed on June 3, 1993. By this action, the Debtor claims Defendant Overstreet violated the automatic stay when she collected the money Barbara Rogers deposited into the Superior Court to obtain the Debtor's release. The Debtor requests that this Court require Overstreet to turnover this money. Finally, the Debtor commenced another adversary proceeding on August 4, 1993, case number 93-1059N, against both Defendants, alleging their counterclaim to his state court action was a violation of the automatic stay, since it sought to recover prepetition debt.[9]

The Court administratively consolidated these proceedings by Order dated September 24, 1993, after finding that common questions of law and fact underlie these cases. In all these proceedings, the Debtor seeks damages of a compensatory and punitive nature, as well as criminal and civil contempt against the Defendants. In turn, the Defendants argue that their actions did not

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[9] The Debtor also commenced an adversary proceeding against Judge Whalen on June 3, 1993. Rogers v. Whalen (In re Rogers), No. 93-1045N (Bankr. N.D. Ga.). That proceeding alleged Judge Whalen violated the automatic stay by having the Debtor incarcerated after the commencement of this case. By that action, the Debtor requested compensatory and punitive damages from Judge Whalen. This Court, however, granted Judge Whalen Summary Judgment by Order dated August 11, 1993, on the grounds the doctrine of juducial immunity prevented the Debtor from bringing such a claim for conduct taken in one's judicial capacity. See Pierson v. Ray, 386 U.S. 547, 553-54 (1967). The Debtor has appealed this decision, and the matters of that proceeding are currently before the United States District Court for the Northern District of Georgia.

violate the automatic stay. As such, they request that the Court deny the relief the Debtor seeks.

CONCLUSIONS OF LAW

A. The Automatic Stay

The success or failure of the Debtor's adversary complaints depends upon whether a violation of the automatic stay occurred. The automatic stay provisions of the Bankruptcy Code are quite broad. In particular, these provisions provide, in part, as follows:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of--
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; . . .

11 U.S.C. § 362(a)(1) & (a)(2). Under these provisions, all proceedings against the debtor and his property are stayed during the pendency of the bankruptcy case. The automatic stay, however, does not allow a debtor to challenge the prepetition conduct of a creditor. Moreover, claims against the debtor that arise postpetition do not come within the scope of § 362(a) since they could not have been brought before the bankruptcy case was commenced. See In re Petruccelli, 113 Bankr. 5, 6 (Bankr. S.D. Cal. 1990).

Despite the broad scope of the automatic stay, however, it does not serve to stay all proceedings involving the debtor. Heflin v. Heflin (In re Heflin), 145 Bankr. 560, 562 (Bankr. S.D. Ohio 1992); In re Shuman, 122 Bankr. 317, 318 (Bankr. S.D. Ohio 1990). In fact, § 362(b) of the Bankruptcy Code expressly provides that certain actions are not stayed by the filing of a petition. Among the acts excepted from the automatic stay is "the collection of alimony, maintenance, or support from property that is not property of the estate." 11 U.S.C. § 362(b)(2) (emphasis added). As such, a former spouse's action to collect prepetition support arrearage is not subject to the automatic stay, so long as property of the estate would not be used to satisfy the claim.

While § 362(b)(2) provides for an exception to the automatic stay in certain situations, a logical inference from this provision is that the automatic stay does apply to the collection of alimony, maintenance, or support from property that is included in the property of the estate. Therefore, the § 362(b)(2) exception has little application in chapter 13 cases[10] since the term "property of the estate" includes earnings of the debtor acquired after the commencement of the bankruptcy case. 11 U.S.C. § 1306(a). The Eleventh Circuit reached this conclusion in Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992), cert. denied, 113 S.Ct. 496, a case with many factual similarities to the proceedings sub judice.

In Carver, the chapter 13 debtor's former wife brought a contempt action in state court, after the bankruptcy case had been commenced, against the debtor in an attempt to collect past due obligations arising from a divorce decree and separation agreement. The state court found the debtor to be in contempt and ordered him incarcerated until he became current on his support obligations. The Eleventh Circuit concluded that the state court contempt action was

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[10] Its application is more prevalent in chapter 7 cases where postpetition income of the debtor does not become property of the estate. Therefore, a former spouse has a greater opportunity to collect past due support payments from a chapter 7 debtor than from someone in chapter 13.

brought in violation of the automatic stay. Specifically, the court in Carver explained:

> [A]lthough the Bankruptcy Code does provide an exception from the automatic stay for the collection of alimony, maintenance, or support, that exception is very narrow--i.e., collection efforts may only be made against property that is not property of the estate. Generally that will include property and earnings acquired by the debtor after filing for bankruptcy protection. However, when a debtor files under Chapter 13, the bankruptcy estate includes property and wages gained after commencement of bankruptcy proceedings. Under this statutory scheme, the exception in 11 U.S.C. § 362(b)(2) has little or no practical effect in Chapter 13 situations.

954 F.2d at 1577; see also Lawson v. Lackey (In re Lackey), 148 Bankr. 626, 629 (Bankr. N.D. Ala. 1992). Therefore, attempts by a former spouse to collect back support payments from a chapter 13 debtor may not escape the scope of the automatic stay, despite § 362(b)(2).

The Court notes that alimony, maintenance, or support obligations are nondischargeable in bankruptcy, even in the chapter 13 context. 11 U.S.C. §§ [sic] 523(a)(5), 1328(a)(2). Nevertheless, the automatic stay applies to all claims, even those that may be excepted from discharge. In re Becker, 136 Bankr. 113, 116 n.1 (Bankr. D. N.J. 1992); In re Miller, 98 Bankr. 110, 113 (Bankr. N.D. Ga. 1989) (Murphy, B.J.). This does not mean, however, that a debtor's former spouse is without any remedy. The Bankruptcy Code allows such a party to seek relief by making a motion to terminate, annul, modify, or condition the automatic stay. 11 U.S.C. § 362(d). In the context of alimony, maintenance, or support, such relief should be liberally granted. Carver, 954 F.2d at 1578; see also Robbins v. Robbins (In re Robbins), 964 F.2d 342, 345-46 (4th Cir. 1992); White v. White (In re White), 851 F.2d 170, 173-74 (6th Cir. 1988);

In re Mann, 88 Bankr. 427, 430 (Bankr. S.D. Fla. 1988) (finding no legitimate reason to deny stay relief in chapter 13 case to enforce debt that is excepted from discharge); McCray v. McCray (In re McCray), 62 Bankr. 11, 12 (Bankr. D. Colo. 1986). Nevertheless, the fact that relief from the stay may be readily granted does not relieve the creditor spouse of the duty to make such a request pursuant to § 362(d). She may not take any collection efforts against estate property until the debt has been determined to be nondischargeable and relief from stay granted. Miller v. Hulvey (In re Hulvey), 102 Bankr. 703, 704-05 (Bankr. C.D. Ill. 1988).

The emphasis on following the proper procedure before attempting to collect alimony, maintenance, or support arrearage is not simply a formality. The consequences can be quite severe on the former spouse if she is found to have violated the automatic stay. Provided the conduct in question does not come within the narrow exception of § 362(b)(2), such actions taken in violation of the stay are void and without effect. Albany Partners, Ltd. V. Westbrook (In re Albany Partners, Ltd.), 749 F2d 670, 675 (11th Cir. 1984); Borg-Warner Acceptance Corp. V. Hall, 685 F. 2d 1306, 1308 (11th Cir. 1982); In re Ungar, 104 Bankr. 517, 520 (Bankr. N.D. Ga 1989) (Drake, B.J.) Moreover, the party guilty of violating the automatic stay may be subject to paying both compensatory and punitive damages to the injured debtor. Therefore, when faced with the possibility of violating the automatic stay, it is in the best interest of the creditor spouse first to come before the bankruptcy court requesting relief from the stay. Accord In re Daugherty, 117 Bankr. 515, 517 (Bank. D. Neb. 1990); In re Weidenhammer, 82 Bankr. 383, 384 n.1 (Bankr. E.D. Pa. 1988).

B. Domestic Relations and Bankruptcy

Before addressing the merits of these proceedings, the Court takes note of the general disdain among federal courts of getting entangled in domestic relations. Within the context of bankruptcy, the Eleventh Circuit in Carver has directed bankruptcy courts to tread very carefully in issues involving domestic relations. As noted above, Carver found a violation of the automatic stay where the debtor's

former spouse brought a state court action against the debtor after the debtor filed his petition. Nevertheless, Carver relied on the domestic relation exception to federal jurisdiction to hold that the bankruptcy court should have abstained from imposing sanctions for that violation. 954 F.2d at 1580.

Based upon Carver, the Defendants have urged this Court to abstain from making a ruling in these proceedings. Carver, however, is not so broad so as to prevent bankruptcy courts from addressing the issue of damages in domestic relations matters. In fact the court stated

> [w]here the purposes of the automatic stay provision would clearly be served by affording a remedy for its violation, and the court would not be required to delve too deeply into family law, the court need not abstain from hearing the claim.

954 F2d at 1580. Therefore, the door remains open for this Court to address the issues raised in these proceedings. Nevertheless, the Court is restricted to matters concerning the automatic stay and will refrain from delving too deeply into state domestic relations law.

Shortly after the Eleventh Circuit reached its decision in Carver, the Supreme Court issued its opinion in the case of Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992), which the Debtor claims overrules Carver's directive to tread lightly in the area of domestic relations. In that case, the Supreme Court held that the domestic relations exception did not require abstention from exercising diversity jurisdiction over a tort action for damages. The lower courts in Ankenbrandt had abstained since the fact of the case involved a domestic dispute. In reaching its decision, the Supreme Court found that the lower courts had given the domestic relations abstention too broad an application. Specifically, the Court concluded that this exception to federal jurisdiction applies only to divest federal courts of the power to grant and modify divorce, alimony, and child support decrees. Id. at 2213-15.

In Carver, the Eleventh Circuit relied heavily upon the domestic relations exception to rule that the lower courts should have abstained. In fact, it appears that Carver gave this abstention policy a much broader interpretation than did Ankenbrandt. For this reason, the Debtor argues that Carver's policy to tread lightly when domestic relations are involved has been overruled by Ankenbrandt. See Lackey, 148 Bankr. At 630 (opining that Ankenbrandt overruled Carver); but see Higgins v. Closeout Distribs., Inc. (In re Higgins), 159 Bankr. 212 (S.D. Ohio 1993) (lower courts should act cautionsly before ruling that circuit court precedent no longer is good law). This Court does not agree. While the use of the domestic relations exception has been limited by the Supreme Court, Carver's decision does not rest solely upon this abstention doctrine. The Bankruptcy Code itself severely limits the authority of bankruptcy courts with respect to domestic relations. For example, its provisions except alimony, maintenance, or support obligations from discharge. See 11 U.S.C. § § 523(a)(5), 1328(a)(2). In addition, as discussed above, one of the exceptions to the automatic stay involves actions to collect alimony, maintenance, or support. See 11 U.S.C. § 362(b)(2). By these provisions of the Bankruptcy Code, Congress has recognized the importance of domestic relations obligations, implicitly mandating that bankruptcy courts proceed with caution in these matters. Carver is consistent with this Congressional policy and distinguishable from Ankenbrandt since Ankenbrandt does not involve bankruptcy. Therefore, this Court declines to find that Carver has been overruled.

Moreover, the Debtor appears to have a misunderstanding of the role of bankruptcy courts in matters of domestic relations. In his briefs, he argues that this Court should review the state court's decisions pertaining to his support obligations. Specifically, he argues as follows:

> [T]he Debtor believes that it is not proper for Bankruptcy Courts to assume that State Courts are infallible in regard to proper levels of support awarded and even in judgments involving contempt for child support arrear. . . . [T]he Bankruptcy Court must be willing to make its own determination of the

> appropriateness of child support levels, [and] the wisdom of State Courts in application of State law
>
> . . .

Debtor's Brief at 3 (Nov. 17, 1993). The Debtor's position that this Court should modify a state court support decree when it sees fit is completely contrary to well settled law. It long has been the position of the Supreme Court that federal courts are not capable of modifying support decrees. See Ankenbrandt, 112 S. Ct. At 2213-14 (discussing history of domestic relations law and federal courts). The Eleventh Circuit has recognized that this rule of law applies in the context of bankruptcy, as well. See Harrell v. Sharp (In re Harrell), 754 F.2d 902, 906-07 (11th Cir. 1985) (noting there is no necessity for bankruptcy court to determine the appropriate level of need or support); see also In re Garrison, 5 Bankr. 256, 260 (Bankr. E.D. Mich. 1980) (noting that Bankruptcy Code does not allow bankruptcy courts to "willy-nilly" modify state court divorce decrees).

It is obvious that the Debtor was dissatisfied with the treatment he received in the state trial court during his divorce, claiming it made numerous errors and treated him unfairly. See Debtor's Brief at 3 (Nov. 17, 1993). If so, his remedy lies by appealing through the state court system. He simply cannot come running to a federal court if he is unhappy with the results of a state court litigation.[11] See generally Pennzoil Co. V. Texaco, Inc., 481 U.S. 1 (1987). Federal courts do not act as appellate courts of the state courts. Mann, 88 Bankr. at 429. The lone exception is the Supreme Court of the United States, and its role is limited to hearing only matters concerning federal law.

Finally, the Court notes that the Debtor has abused the bankruptcy system. He ha admitted that he filed his petition for the

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[11] The Debtor has stated that his time for appeal of the state court had expired by the time he filed his petition. This fact, however, is immaterial. A party cannot gain access to the federal courts simply by failing to make a timely appeal in the state court. Once the time for appeal expired, the Debtor was bound by the state court decision.

sole reason of bringing his "excessive" child support payments to an affordable level. See Debtor's Brief at 3 (Nov. 17, 1993). The bankruptcy courts are not to be used as a weapon in an on-going domestic relations dispute. See Carver, 954 F.2d at 1580; see generally Wetmore v. Markoe, 196 U.S. 68 (1904) (noting that bankruptcy law is not to be used as instrument to deprive dependents of their right to support and maintenance). When a debtor does seek shelter in bankruptcy to avoid his dometic relations obligations, he has filed his petition in bad faith. See In re Warner, 115 Bankr. 233, 236 (Bankr. C.D. Cal. 1989) (lack of good faith prevented confirmation of plan); In re Scarborough, 50 Bankr. 1, 1 (Bankr. S.D. Miss. 1985). The troubles the Debtor has experienced have been brought on by himself. He has disregarded the authority of the state courts on repeated occasions by failing to pay his child support obligations. In fact, the state court has found him to be in contempt on three separate occasions over a period of less than two years. Ironically, it is the Debtor now who is complaining that the Defendants are disregarding the authority of the bankruptcy court.

The Debtor has attempted to entangle the bankruptcy courts with his state law domestic relations dispute. This Court wishes to make it clear that it will not serve as a haven for debtors who wish to escape their alimony, maintenance or support obligations. Such conduct by a debtor is contrary to the purposes underlying the Bankruptcy Code and is repugnant to the interests of justice. Had a party filed a timely motion early on in this case, the Court likely would have dismissed the Debtor's petition as a bad faith filing based upon the facts currently before it.

C. Adversary Proceedings

In turning to the facts of these adversary proceedings, the Court will keep in mind the above discussions about the automatic stay and domestic relations issues in bankruptcy. The facts of each adversary proceeding will be considered individually below.

1. Case No. 93-1012N

In his first adversary proceeding, the Debtor alleges the Defendants violated the automatic stay with their state court contempt proceeding. At first glance, the decision in Carver would appear to be controlling in this case in view of the many factual similarities. As previously discussed, Carver found a violation of the automatic stay when the debtor's former spouse commenced a state court contempt proceeding against the debtor to collect alimony, maintenance, or support. A closer look at these two cases, however, reveals that there is an important factual distinction. Specifically, the defendants in Carver brought their contempt action against the debtor after the debtor filed his chapter 13 petition. On the contrary, the Defendants in this proceeding commenced the state court action the Superior Court of Spalding County, Georgia, on August 17, 1992, over five months before the Debtor filed his bankruptcy case. Moreover, a judgment was reached, finding the Debtor to be in contempt, on January 19, 1993, sixteen days before the bankruptcy case was commenced. Therefore, the fact the Defendants brought and pursued their state court contempt action to judgment does not demonstrate they violated the automatic stay since all these events occurred prior to the Debtor's bankruptcy petition.

The Debtor alleges a violation of the stay occurred on February 4, 1993, the date he was incarcerated just a few hours after filing his chapter 13 bankruptcy petition. Specifically, he argues as follows:

> Defendants first violated the automatic stay by not acting to prevent the Debtor's arrest once Defendants were notified of the bankruptcy filing. Defendants were obligated to take all reasonable actions to prevent Debtor's arrest and--once he was arrested--to press State Superior Court for Debtor's release.

See Debtor's Brief at 5 (Nov. 17, 1993). This Court does not agree with the Debtor's arguments. The Defendants' involvement in the state court action was at an end once Judge Whalen entered his order on January 19, 1993. The incarceration that occurred on the date the

Debtor filed his petition was an act of the state court trying to enforce it judgment, and it was not an act of the Defendants. As such, the Defendants did not violate the stay when the Debtor was placed in jail.

In support of his position, the Debtor cites the case of In re Dembek, 64 Bankr. 745 (Bankr. N.D. Ohio 1986). In that case, the court noted that "a refusal or failure to take action is an act " within the meaning of § 362(a). Id. at 750. While this fact may be true, it applies only in cases where there is a duty to act in the first place. Here, the Debtor has failed to show that there was a duty on the Defendants to prevent the state court from carrying out its own order. Moreover, the Court notes that evidence was presented at trial indicating that Defendant Connell contacted Judge Whalen, informing him of the bankruptcy petition and the automatic stay.[12] Therefore, even if there were a duty upon the Defendants, they did take steps to try to prevent the Debtor's incarceration. Finally, the Court notes that it was the Debtor who carries the blame for his own incarceration, since it was caused by his repeated failures to comply with the state court orders requiring him to satisfy his marital and domestic obligations.

The proper course of action for the Debtor to have taken in this situation was to file a motion with the state court, notifying it of his bankruptcy petition and the application of the automatic stay. It is settled law that bankruptcy courts do not have exclusive jurisdiction in determining the applicability of the automatic stay. As one court has stated:

> The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay.

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[12] See Tr. At 28-33 (Nov. 18, 1993); Defendants' Exhibit 1 (letter from Judge Whalen acknowledging being contacted regarding Debtor's petition).

Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litigation), 765 F.2d 343, 347 (2d Cir. 1985); see also NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 939 (6th Cir. 1986); NLRB v. Sawulski, 158 Bankr. 971, 975 (E.D. Mich. 1993); Sea Span Pub., Inc. v. Greneker (In re Sea Span Pub., Inc.), 126 Bankr. 622, 624 (Bankr. M.D. Fla. 1991); In re Bona, 124 Bankr. 11, 15 (S.D. N.Y. 1991). Since the state court heard the underlying civil action, entered a judgment, and had custody of the Debtor, it likely was the best forum in which to decide the applicability of the automatic stay.[13] If the Debtor had been dissatisfied with the state court's decision of that issue, he had the option of appealing through the state court system.

Accordingly, the Court finds that the Defendants did not violate the automatic stay by allowing the Debtor to be incarcerated. The conduct in question were not acts of the Defendants, but were acts of the state court attempting to enforce its own judgment entered prior to the Debtor's bankruptcy petition.[14] Moreover, the

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[13] In fact, this issue may have been presented to the state court. Evidence from these adversaries and the Debtor's adversary against Judge Whalen indicates that the Debtor contacted Judge Whalen to inform him of his bankruptcy petition and the automatic stay. Whether or not Judge Whalen addressed the issue of the scope of the automatic stay, however, is not relevant to the proceeding currently before the Court.

[14] Whether or not the state court violated the automatic stay by incarcerating the Debtor for his contempt is another matter. Several cases have discussed this issue and have been reluctant to find that the automatic stay applies to actions of a nonbankruptcy court to enforce its contempt orders. See, e.g., Sawulski, 158 Bankr. At 976-77 (automatic stay does not apply to proceeding to enforce compliance with a court's orders); O'Brien v. Nachtigal (In re O'Brien), 153 Bankr. 305 (D. Or. 1993) (contempt proceeding for prepetition disobeyance of state court order not subject to automatic stay); Stovall v. Stovall, 126 Bankr. 814 (N.D. Ga. 1990) (contempt proceeding not stayed so long as it pertains to upholding prebankruptcy dignity of court); US Sprint Comm. Co. v. Buscher, 89 Bankr. 154 (D. Kan. 1988) (it is within court's inherent powers to take whatever steps necessary to ensure compliance with its orders, and Congress did not intend to strip this power through the automatic stay). It is not necessary, however, for the Court to address this issue. Only the actions of the Defendants are in question in these proceedings,

Defendants were under no obligation to prevent the Debtor's incarceration or press the state court for his release once arrested. In view of this conclusion, the Court need not address the issues of damages and abstention.

2. Case No. 93-1044N

The Debtor's second adversary complaint is against Defendant Overstreet. In this proceeding, the Debtor alleges Overstreet violated the automatic stay when she received funds from the Superior Court of Spalding County, Georgia, which had been paid to obtain the Debtor's release from jail. The Debtor requests that these funds be returned to the estate and that Overstreet be ordered to pay a punitive award to force her future compliance with orders of this Court.

As previously noted in this Order, the Debtor's mother, Barbara S. Rogers, obtained the Debtor's release from jail on February 19, 1993, when she paid the sum of $7,524.00 to the Superior Court of Spalding County, Georgia. Overstreet, however, did not collect these funds until February 26, 1993, after this Court held an in chambers conference with the attorneys of the parties involved. At that conference, the parties agreed that the funds paid by Debtor's mother were not property of the estate, and Overstreet could proceed to collect them. The reason for this conclusion was that this money was the property of Barbara S. Rogers, and not the Debtor's property. These funds did not come from the Debtor's regular income or his savings. The money from the Debtor's mother merely was a postpetition loan at best and did not become property of the Debtor's estate. See Carver, 954 F.2d at 1580 (funds borrowed by the debtor postpetition to obtain his release from jail did not become property of the estate). As discussed earlier in this Order, the automatic stay does not apply to collecting alimony, maintenance, or support from property that is not property of the Debtor's estate. 11 U.S.C. § 362(b)(2). Accordingly, Overstreet did not violate the automatic stay

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and not the actions of the state court.

to the extent she collected alimony, maintenance, or support from the Superior Court.

Of the $7,524.00 Overstreet received on February 26, 1993, $4,625.00 represents child support payments. There is no dispute this amount qualifies as alimony, maintenance, or support, so Overstreet was allowed to receive this money from nonestate property. The Debtor argues, however, that the funds for attorney's fees are not support payments. For a state court in Georgia to award attorney's fees in a divorce proceeding, it "shall consider the financial circumstances of both parties as a part of its determination to the amount of attorney's fees." O.C.G.A. § 19-6-2(a)(1). As such, the Superior Court of Spalding County necessarily must have evaluated the financial position of both the Debtor and Overstreet and determined that Overstreet was in need of this assistance from her former spouse. Therefore, the Court finds that the Debtor's obligation to pay attorney's fees qualifies as alimony, maintenance, or support. Accord Williams v. Williams (In re Williams), 703 F.2 1055, 1057 (8th Cir. 1983); Townsend v. Townsend (In re Townsend), 155 Bankr. 235, 238 (Bankr. N.D. Okla. 1993); Meyers v. Meyers (In re Meyers), 61 Bankr. 891, 895 (Bankr. N.D. Ga. 1986) (Kahn, C.J.). Overstreet was not stayed from collecting these fees from nonestate property.

The Court is concerned, however, about the $1,934.00 which represents a debt to Sears. It is not clear whether the Debtor's obligation to pay this debt is in the nature of alimony, maintenance, or support. If this obligation merely was a property settlement between the Debtor and Overstreet, the exception to the automatic stay found in § 362(b)(2) may not apply. As such, the Court will reserve judgment on the Sears debt to allow the parties to address this issue. The Court will accord deference to the decision of the Superior Court of Spalding County when it issued the divorce decree as to whether this debt constituted alimony, maintenance, or support. Any issue of damages will be limited to whether this Court should order a

turnover of these funds.[15]

3. Case No. 93-1059N

The Debtor brought his third adversary proceeding alleging the Defendants violated the automatic stay by filing the counterclaim against the Debtor in state court. At the outset, the Court notes the Defendant's argument that a counterclaim is not prohibited by the automatic stay since it is in response to an action filed by the Debtor. This argument must fail, however, in view of the plain language of § 362, which applies to all actions "commenced . . . to recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(2). In filing a counterclaim, a party commences an action against a debtor to recover a claim. Therefore, the Court finds that a counterclaim which seeks to recover a prepetition claim is subject to the provisions of the automatic stay. A party must seek relief from the stay before filing such a claim.

It is the Debtor's position that the Defendants' counterclaim sought to collect prepetition debts. If so, it may be a violation of the automatic stay. The language of the counterclaim itself is ambiguous as to whether or not it seeks prepetition debt. It only states that the Debtor was in arrears of his child support obligations. At the trial before this Court, however, the Defendants testified that they made it clear to the state court judge they only were pursuing postpetition claims.[16] Indeed the Order of the state court supports this position. Specifically, the Honorable Ben J. Miller, Judge of the Superior Court

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[15] The Court notes that the codebtor stay of 11 U.S.C. § 1301(a) prevents Sears from collecting this debt from Overstreet, assuming Overstreet was jointly liable for it. Moreover, if a turnover of these funds is required, the Court does not decide at this time whether this money would be returned to the Debtor's mother or to the estate.

[16] See Tr. at 19 (Nov. 18, 1993). When asked why prepetition support obligations were included in the counterclaim, Defendant Connell stated that the "convoluted" manner in which the Debtor was making his payments made it unclear as to whether the debts involved were prepetition or postpetition. Id. at 18.

of Spalding County, Georgia, ordered as follows:

> [The Debtor] is found to be in wilful contempt for his failure to pay medical expenses and medical insurance costs in the amount of $434.68 which have accrued after [the Debtor] filed a petition in bankruptcy. [The Debtor] is ordered to pay the sum of $434.68 immediately and failing such payment shall be held in the common jail of Spalding County until he purges himself from that contempt.
>
> The Court further finds that [the Debtor] is in arrears in child support in the amount of $360 and in court ordered payment of medical insurance premiums in the amount of $33.77. Both such amounts accrued prior to the filing of [the Debtor's] bankruptcy petition and Defendant [Overstreet] has advised the court that she is not seeking to have [the Debtor] held in contempt for such arrearage. The Court understands that the prebankruptcy arrearage of $393.77 ($360 + $33.77) will be paid by [the Debtor] through the bankruptcy court and this court takes no action in regard to the enforcement of such pre-bankruptcy petition arrearage other than to find and determine the amount thereof.

Rogers v. Overstreet, No. 93-V-861, slip op. At 2 (Super. Ct. Spalding County, Georgia, Aug. 31, 1993) (emphasis added). The Court finds that this Order of the state court establishes that the Defendants were not trying to collect a prepetition debt in their counterclaim. For this reason, the Defendants' counterclaim did not violate the automatic stay.

Even if the counterclaim were an attempt to collect a prepetition debt, the Defendants' action likely would have escaped the scope of the automatic stay. As previously discussed, § 362(b)(2) states that the automatic stay does not apply to the collection of alimony, maintenance, or support from property that is not property

of the estate. Once a debtor's chapter 13 plain is confirmed, case authority suggests that property of the estate includes his earnings only to the extent necessary to fund the plan. See American General Fin., Inc. v. McKnight (In re McKnight), 136 Bankr. 891, 894-95 (Bankr. S.D. Ga. 1992) (holding that postpetition earnings not necessary for plan no longer are property of estate after confirmation); In re Ziegler, 136 Bankr. 497, 500 (Bankr. N.D. Ill. 1992); Pacana v. Pacana (In re Pacana), 125 Bankr. 19, 22 (Bankr. 9th Cir. 1991); McCray, 62 Bankr. at 12; In re Adams, 12 Bankr. 540, 543 (Bankr. D. Utah 1981). In this case, the Debtor's plan requires him to make monthly payments of $420.00 per month. The Debtor's income over and above that amount is not necessary to fund his chapter 13 plan, and as such, may not be property of the estate. Therefore, the Defendants' counterclaim would not have violated the automatic stay to the extent it sought prepetition support payments from the Debtor's earnings not necessary to fund the plan.

CONCLUSION

In conclusion, the Court finds that the Defendants had no affirmative duty to prevent the Debtor's incarceration for his contempt of the Superior Court of Spalding County, Georgia. The Debtor's incarceration was an act of the state court and not of the Defendants. Moreover, Defendant Overstreet's act of collecting $7,524.00 from the state court did not violate the automatic stay to the extent this money represented payments in the nature of alimony, maintenance, or support. These funds were paid to the state court by the Debtor's mother and were not property of the Debtor's estate. Finally, the Defendants' counterclaim against the Debtor did not violate the automatic stay since the Defendants' only sought to collect postpetition support payments. Accordingly, the relief requested by the Debtor in these adversary proceedings is **DENIED**. A separate and final judgment in favor of the Defendants shall be entered in the Debtor's first and third adversary proceedings. A partial judgment in favor of Defendant Overstreet shall be entered in the second proceeding.

IT IS SO ORDERED.

At Newnan, Georgia, this 20 day of January, 1994.

s/ W. Homer Drake, Jr.
W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C--JUDGMENT OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
GEORGIA, NEWNAN DIVISION

IN THE MATTER OF:	:	DOCKET NUMBER:
Ralph Rogers	:	3:94-cv-20 JTC
	:	3:94-cv-21 JTC
Plaintiff	:	3:94-cv-22 JTC
v.	:	NAME OF JUDGE:
	:	Jack T. Camp
Sara Jane Overstreet &	:	
Alan W. Connell	:	
Defendants.	:	

Decision by Court. This action came for consideration before the Court with the judge named above presiding. The issues have been considered and a decision rendered, adopting the Bankruptcy Judge's order. IT IS ORDERED AND ADJUDGED that the decision of the Bankruptcy Judge is AFFIRMED. ****

Filed and Entered
July 25, 1994
LUTHER D. THOMAS, CLERK

By: /s DB
Deputy Clerk

Clerk: LUTHER D. THOMAS NEWNAN, GEORGIA DATE:

(BY) DEPUTY CLERK
/s Danny Brown

NEWNAN, GEORGIA July 25, 1994

APPENDIX D--ORDER OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C., Newnan
JUL 25, 1994
LUTHER D. THOMAS, Clerk
By: /s DB
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	
RALPH M. ROGERS,	:	
Plaintiff	:	
	:	CIVIL ACTION FILE NO.
v.	:	3:94-cv-20 JTC
	:	3:94-cv-21 JTC
SARA JANE OVERSTREET & ALAN W. CONNELL,	:	3:94-cv-22 JTC
Defendants.	:	

ORDER

Ralph M. Rogers appeals from the United States Bankruptcy Judge W. Homer Drake's Order of January 20, 1994, granting judgment to Defendants by finding that the relief sought by Rogers in the first and third adversary proceedings is denied, and granting partial judgment to Defendants in the second adversary proceeding by finding that the relief sought as to $5,590 of sums distributed to

Overstreet and Connell was proper, but reserving judgment on the $1,934 sum due to Sears.

The instant appeal arose out of a Chapter 13 petition for relief, filed on February 4, 1993. Debtor filed threee adversary proceedings against Defendants. The Bankruptcy Court held a hearing and issued one opinion as to the three proceedings. Accordingly, this Court will consider the issues in one opinion.

The principle issue in each of these adversary proceedings is whether certain actions of the Defendants, occurring on different occasions, violated the automatic stay provisions of 11U.S.C. § 362.

On appeal of a Bankruptcy Court's Order, the Bankruptcy Court's findings of fact should not be disturbed unless a District Court believes clear error exists. In Re: T & B General Contracting, Inc., 833 F.2d 1455, 1460 (11 th Cir. 1987). Debtor first challenges the findings of fact that $360 in child support arrears was not pre-petition. The Court, however, did not determine that the $360 was not pre-petition. Instead, it concluded that the $360 was pre-petition debt but that the Order of the State Court established that the Defendants were not trying to collect a pre-petition debt. With this the Court agrees.

Debtor further challenges as error the Bankruptcy Court's finding of fact that Defendants informed Judge Whalen of Debtor's Bankruptcy filing. The Court finds that this finding was correct, but further agrees with the Bankruptcy Court that the action of the Superior Court in issuing the warrant for Debtor's arrest was not within Defendants' control. The Court further concurs with the Bankruptcy Court that Defendants had no duty to debtor to prevent the execution of the warrant or to demand his release. As such, the Bankruptcy Court is correct in determining that the "inaction" by Defendants concerning any lack of demand for Debtor's release did not amount to a violation of the automatic stay provision.

The Court finds that all findings of fact, as stated by the Bankruptcy Judge are correct.

Debtor next complains about the Sears debts. Specifically, Debtor challenges a lack of finding by the Bankruptcy Judge as to the Sears debt. Accordingly, Debtor asks the Court [to] determine whether Defendant Overstreet's filing to collect the debt owed to Sears was in violation of the automatic stay, whether the Sears debt was pre-petition, and whether Defendant's filing in the Superior Court to obtain payment on the Sears debt violated the automatic stay.

The issue of whether any action related to the Sears debt was in violation of an automatic stay provision has not yet been determined by the Bankruptcy Court. The Bankruptcy Judge expressed concern regarding that issue, and reserved judgment on it pending further briefing by the parties. No issue relating to the Sears debt is, therefore, ripe for this Court's review.

Debtor claims that the funds deposited into the Court registry to obtain Debtor's release from jail were part of the Debtor's estate, and therefore should not have been released to Defendant Overstreet in payment of his child support obligations to her. First, the Court notes that the parties, including Debtor's attorney, agreed in a conference with the Bankruptcy Court prior to disbursement of the funds, that the funds were not part of the Debtor's estate. Based on his counsel's agreement to that conclusion, he is now estopped to challenge that agreement.

Further, the Court finds that the Bankruptcy Court Judge was correct in concluding that those funds, the property of Barbara Rogers, were not the Debtor's property. Carver v. Carver, 954 F.2d 1573, 1580 (11 th Cir.), cert. denied, 113 S.Ct. 496 (1992). Accordingly, the Bankruptcy Court's conclusion that the disbursement of those funds was not in violation of the automatic stay is correct.

Finally, Debtor argues that Ankenbrandt v. Richards, 112 S.Ct. 2206 (1992) overrules Carver v. Carver, 954 F.2d 1573 (11 th Cir. 1992). Ankenbrandt concerned the so-called domestic relation exception to tort cases brought under diversity jurisdiction. That case

was brought by a mother against her ex-husband alleging torts to their children based on alleged physical and sexual abuse. The Court determined that the domestic relations exception only encompasses the issuance of a divorce, alimony or child custody decree. The Court then concluded that the Court should properly exercise jurisdiction over the controversy. Id.

The Carver case, on the other hand, was a bankruptcy case, with facts similar to the case at bar, wherein the court stated that although not required to abstain from hearing a claim, the bankruptcy court should "tread lightly" when asked to impose sanctions for violations of an automatic stay where the underlying action involves alimony, maintenance or support. Carver, 954 F2d at 1573.

The Bankruptcy Court was correct with respect to it[s] handling of this issue. Ankenbrandt did not encompass the same issues as Carver and therefore does not overrule that case. Further, the Court agrees that the Bankruptcy Code implicitly mandates caution in the area of domestic relations.

Even if Ankenbrandt overruled Carver, the results of this proceeding would not change. Not only did the Bankruptcy Court refuse to abstain from exercising its jurisdiction over the matter pursuant to Carver, the Court specifically found that as to each of the issues raised,[17] there had been no violation of the automatic stay. Furthermore, it is irrelevant whether the Court should "tread lightly" in imposing sanctions for violations of a stay, as there is no violation here.

The Court concludes that the Bankruptcy Court, in its well-reasoned and carefully considered opinion, was correct in all respects. The Court, therefore **ADOPTS** the Bankruptcy Court's Order.

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[17] The issues Debtor alleges constituted violations of the automatic stay were (1) the state proceeding regarding the contempt hearing which ultimately resulted in the Debtor's incarceration; (2) Defendant Overstreet's receipt of the funds from the Court registry; and (3) the assertion of the Counterclaim in the state court action.

SO ORDERED, this 20 day of July 1994.

/s Jack T. Camp
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

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APPENDIX E--ORDER OF THE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 6 1996
MIGUEL J. CORTEZ
CLERK

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8880
Non-Argument Calendar

D. C. Docket No. 3:94-CV-20-JTC
BKPTCY No. 93-1044

IN RE: RALPH M. ROGERS,
Debtor.

RALPH M. ROGERS,

Petitioner-Appellant,

versus

SARA JANE OVERSTREET,
ALAN W. CONNELL, Attorney,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 6, 1996)

Before TJOFLAT, Chief Judge, HATCHETT and CARNES, Circuit Judges.

PER CURIAM:

Ralph Rogers appeals the district court's affirmance of the bankruptcy court's findings and conclusions that the defendants did not violate the automatic stay under 11 U.S.C. § 362. Having read the briefs and pertinent parts of the record, we conclude that the bankruptcy court's findings were not clearly erroneous and its conclusions of law were correct, and accordingly we affirm.

AFFIRMED.

A True Copy-Attested:
Clerk of the Court of Appeals,
Eleventh Circuit

By: s/ Anthony Ricciardi
Deputy Clerk
Atlanta, Georgia

APPENDIX F--JUDGMENT OF THE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8880
Non-Argument Calendar

D. C. Docket No. 3:94-CV-20
and Bankruptcy #93-1044

IN RE: Ralph M. Rogers, Debtor

RALPH M. ROGERS,

Plaintiff-Appellant,

versus

SARA JANE OVERSTREET,
ALAN W. CONNELL, Attorney,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 6, 1996)

Before TJOFLAT, Chief Judge, HATCHETT and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in the cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 6, 1996
For the Court: Miguel J. Cortez, Clerk

By: s/Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/8/96

A True Copy - Attested:
Clerk of the Court of Appeals
Eleventh Circuit

By: s/ Anthony Ricciardi
Deputy Clerk
Atlanta, Georgia

APPENDIX G--ORDER ON SUGGESTION FOR REHEARING EN BANC BEFORE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
JUL 28 1996
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8880

IN RE: RALPH M. ROGERS,

Debtor.

RALPH M. ROGERS,

Petitioner-Appellant,

versus

SARA JANE OVERSTREET,
ALAN W. CONNELL, Attorney,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

BEFORE: TJOFLAT, Chief Judge, HATCHETT and CARNES,

Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Ralph Rogers is denied.

ENTERED FOR THE COURT:
s/Ed Carnes
UNITED STATES CIRUIT JUDGE

ORD-41

APPENDIX H--JUDGMENT ON SUGGESTION FOR REHEARING EN BANC BEFORE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
JUL 28 1996
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8880

IN RE: RALPH M. ROGERS,

Debtor.

RALPH M. ROGERS,

Petitioner-Appellant,

versus

SARA JANE OVERSTREET,
ALAN W. CONNELL, Attorney,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

BEFORE: TJOFLAT, Chief Judge, HATCHETT and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
s/Ed Carnes
UNITED STATES CIRUIT JUDGE

ORD-42

(6/95)

APPENDIX I--LETTER PRESENTED AS TESTIMONIAL EVIDENCE IN FEDERAL BANKRUPTCY COURT BY DEFENDANTS/APPELLEES

ANDREW J. WHALEN, JR.
GRIFFIN, GEORGIA

P.O. BOX 627
JUDGE, SUPERIOR COURTS

TELEPHONE 404/227-7539
GRIFFIN JUDICIAL CIRCUIT
FAX 404/412-0097

October 8, 1993

Alan W. Connell, Esquire
Attorney at Law
P. O. Box 1206
Thomaston, GA 30286

Dear Alan:

I am in receipt of your letter of September 27 th regarding the Mark Rogers matter.

I do recall that we had a conversation wherein I told you that Commissioner Merrill Massengale had called me in reference to the Rogers case. Beyond that, however, I am unable to recall the contents of our conversation.

With kindest regards, I am

Very truly yours,
s/Andrew J. Whalen, Jr.
ANDREW J. WHALEN, JR.
JUDGE, SUPERIOR COURTS
GRIFFIN JUDICIAL CIRCUIT

AJWjr:dwh